IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Sultan & Another Vs. State of Rajasthan
(D.B. Criminal Appeal No.553/2006)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 20-5-2006 in Sessions Case No.43/2004 (27/2004) passed by Sh. Harphool Singh Pilaniya, RHJS, Additional Sessions Judge (Fast Track) Behror District Alwar.

2. Ram Swaroop & Others Vs. State of Rajasthan
(D.B. Criminal Appeal No.154/2004)

3. Kailash Vs. State of Rajasthan
(D.B. Criminal Appeal No.85/2004)

D. B. Criminal Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 12-12-2003 in Sessions Case No.27/2003 (68/2002) passed by Sh. Hari Kishan Khichar, RHJS, Additional Sessions Judge (Fast Track) Behror District Alwar.

4. Man Singh Vs. State of Rajasthan & Others
(D.B. Criminal Revision Petition No.702/2006)

D. B. Criminal Revision Petition under Sec.397 read with 401 Cr.P.C. against the judgment dated 20-5-2006 in Sessions Case No.43/2004 (27/2004) passed by Sh. Harphool Singh Pilaniya, RHJS, Additional Sessions Judge (Fast Track) Behror District Alwar.

Date of Judgment: August 14, 2007.

PRESENT
HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. Biri Singh Sinsinwar] for the appellants.
Mr. Kamlendra Sihag]
Mr. Pankaj Gupta]
Mr. M.L.Goyal, Public Prosecutor for the State.
Mr. Praveen Balwada] for the complainant.
Mr. Suresh Dhenwal]
Mr. J.K.Yogi, for accused respondents Umrao and Chhitar.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Maxim `FALSUS IN UNO, FALSUS IN OMNIBUS' (false in one thing, false in everything) does not apply to criminal trials in India because people of our country are not immuned of exaggerating and twisting facts. Man Singh, the informant of this case is no exception. Finding Arjun Singh murdered, he instead of going to police station, proceeded to Tehsil premises and got the FIR typed wherein 20 persons were named as assailants out of which Investigating Agency indicted only eight before learned Additional Sessions Judge (Fast Track) Behrod District Alwar, who in two separate trials convicted and sentenced six appellants as under:-

Appellants Ram Swaroop, Kailash, Basanta Ram and Jhabar Mal (in sessions case No.27/2003 decided on December 12, 2003):
Appellants Sultan and Sua Lal (in sessions case No.43/2004 decided on May 20, 2006):
U/s.302/149 IPC:

Each to suffer life imprisonment and fine of Rs.2000/-, in default to further suffer simple imprisonment for six months.

U/s.148 IPC:

Each to suffer rigorous imprisonment for one year and fine of Rs.200/-, in default to further suffer simple imprisonment for one month.

The substantive sentences were ordered to run concurrently.

Appellants Ram Swaroop, Basanta Ram and Jhabar Mal have preferred Appeal No.154/2004, whereas appellant Kailash filed appeal No.85/2004 and appellants Sultan and Sua Lal submitted appeal No.553/2006. Finding of acquittal of co-accused Umrao and Chhitar has

been called in question by complainant Man Singh in revision petition No.702/2006.

2. The prosecution story is woven like this:-

On July 1, 2002 at 6 AM while Arjun Singh was easing himself in an open field, as many as 20 persons came over there and inflicted injuries on the person of Arjun Singh with lathis, spears and iron rods. They dragged injured Arjun Singh to the house of Basanta. Typed report of the incident was submitted by Man Singh at Police Station Bansoor at 11 AM. On that report a case under sections 147, 148, 149, 302 and 341 IPC was registered and investigation commenced. Autopsy on the dead body was performed, necessary memos were drawn, statements of witnesses were recorded, accused were arrested and on completion of investigation charge sheet was filed against Ram Swaroop, Kailash, Basanta Ram and Jhabar Mal. Investigation was kept pending under section 173(8) CrPC against other accused. In due course Sessions Case No.27/2003 came up for trial before the learned Additional Sessions Judge (Fast Track) Behrror (Alwar). Charges under sections 148 and 302/149 IPC were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as may as 17 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. No witness in support of defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced Ram Swaroop, Kailash, Basanta Ram and Jhabar Mal. In another Sessions Trial bearing No.43/2004 appellants Sultan and Sua Lal were convicted and sentenced and co-accused Umrao and Chhitar got acquitted as indicated herein above.

3. Death of Arjun Singh was undeniably homicidal in nature. As

per post mortem report (Ex.P-1) he received following ante mortem injuries:-

1. LW on Lt. thigh middle 1/3rd pair laterally 3cm x 2cm x 1cm
2. LW Lt. popli-teal region 5cm x 2cm x 2cm
3. LW Lt. lower leg anteriorly lower 1/3rd 3cm x 1cm x 2cm
4. LW left lower leg lower 1/3rd part laterally just above lateral mellolous.
5. Multiple contusion Bluish in color over whole Lt. lower leg (1cm x 1cm x 1cm antero laterally size ranging from (10cm-12cm x 5cm-6cm Surrounded by hematoma.
6. Contusion with hematoma just above left knee (12cm x 6cm)
7. LW Rt. thigh lower 1/3rd part laterally above the knee with hematoma (2cm x 2cm x 2cm)
8. LW Rt. lower leg lower 1/3rd for anteriorly 1½cm x 1cm x 1cm
9. Contusion bluish in color with hematoma near injury 7 15cm x 3cm.
10. Contusion on Rt. lower leg posterior medially 15cm x 2½cm.
11. Contusion Bluish in color left lower part of chest antero laterally (10cm x 4cm) Blood is coming out from all the lacerated injuries.

According to Dr. R.K.Khatri (Pw.3) the cause of death was multiple fractures leading to massive hemorrhage and shock.

4. Having considered the rival submissions and gone through the evidence adduced at the trial, we notice that the prosecution case is founded on the eye witness account of Shimbhu Singh (Pw.1), Munshi Singh (Pw.2), Man Singh (Pw.7), Mahendra Singh (Pw.9), Sudesh (Pw.10), Prem Devi (Pw.11) and Smt.Asmana (Pw.12). In his deposition Man Singh (Pw.7), brother in law (Sala) of the deceased, stated that on hearing cries of his sister when he reached to the place of incident he saw Ram Swaroop and Basanta

inflicting blows with lathis on the right foot, thigh and testicles of Arjun Singh. Jhabar and Sultan caused injuries with spears on the sole of foot, calf and private parts, whereas Kailash, Laxman, Sua Lal and Banwari gave blows with lathis on the private parts, hands and back. In his cross examination Man Singh admitted that he got the report typed out side Tehsil building. (तहसील के बाहर रिपोर्ट टाइप कराई थी।) Shimbhu Singh (Pw.1) deposed that the assailants who killed Arjun Singh were Ram Swaroop, Basanta, Jhabar and Kailash and other persons were standing nearby (उसको जान से खत्म करने वाले राम स्वरूप, बसन्ता, झाबर, कैलाश थे बाकी और अन्य लोग भी वहां पर खडे थे।). Munshi Singh (Pw.2) stated that Basanta, Jhabar, Kailash and Ram Swaroop hurled abuses and gave beating to Arjun Singh. Mahendra singh (Pw.9), brother of Arjun Singh, deposed that Basanta, Jhabar, Umrao, Ram Swaroop, Sultan, Banwari and Chhitar inflicted 5-7 injuries on the person of Arjun Singh (उसके 5-7 चोटें बसन्ता, झाबर, उमराव, रामस्वरूप, सुल्तान, बनवारी छीतर ने मारी।) Sudesh (Pw.10), Prem Devi (Pw.11) and Asmana (Pw.12) also named Ram Swaroop, Basanta, Jhabar, Sultan, Sua Lal and Laxman as assailants.

5. It also appears that as per inspection memo of dead body (Ex.P-6) Arjun Singh was found lying dead near the residence of Basanta.

6. Factual situation of the case may be summarized as under:-

(i) FIR of the incident was lodged after five hours of the incident.

(ii) Informant Man Singh insisted of rushing to the Police Station, proceeded to Tehsil to get the report typed.

(iii) As many as 20 persons were named as assailants in the

FIR, but only eight were charge sheeted.

(iv) Arjun Singh was unarmed while attacked. The assailants went on pounding on the legs of Arjun Singh and caused multiple fractures as a result of which Arjun Singh died instantly.

(v) Dead body of Arjun Singh was found lying near the house of accused Basanta.

(vi) Accused Basanta had previous animosity with the deceased.

7. In order to point out contradictions and embellishments, learned counsel took us through the statements of witnesses. According to learned counsel the witnesses are wholly unreliable witnesses and their testimony deserves to be rejected outrightly.

8. We have pondered over the submissions. It is no doubt true that the witnesses have been found to have given unreliable evidence in regard to certain particulars, we cannot reject their testimony mechanically. We have to disengage the truth from the falsehood, to sift the grain from the chaff. In State of U.P. Vs. M.K. Anthony (AIR 1985 SC 48) Hon'ble Apex Court propounded that where a witness has been found to have given unreliable evidence in regard to certain particulars, the approach of Court must be to see whether the evidence of the witness read as a whole appears to have a ring of truth. Once the impression is formed, it is for the court to scrutinise the evidence more particularly keeping in view of deficiencies drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it

unworthy of belief.

9. Coming to the prosecution evidence adduced in the instant case we find that the discrepancies pointed out by the learned counsel do not affect the core of the case. In Munshi Prasad v. State of Bihar (2002)1 SCC 351, the Hon'ble Supreme Court indicated that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. If the general tenor of the evidence given by the witness and the trial court upon appreciation of evidence forms opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. In Sukhdev Yadav v. State of Bihar (2001)8 SCC 86, it was observed by the Apex Court that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment.

10. We also noticed that the lacerated wounds sustained by the deceased were on non vital parts of the body. The witnesses although deposed that injuries with spear were also caused, no injury of such nature was detected on the dead body. On examining the evidence from the angle of trustworthiness, we find it consistent qua appellants Basanta and Ram Swaroop only. Looking to the fact that informant Man Singh took ample time in getting the FIR typed, possibility of over implication of other accused can not be ruled out.

11. It is however established that Basanta and Ram Swaroop shared common intention in committing murder of Arjun Singh. Section 34 IPC

recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. A common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

12. In Gopi Nath v. State of UP (2001)6 SCC 620, the Apex Court indicated that:-

> "Section 34 IPC lays down the rule of joint responsibility for criminal acts performed by plurality of persons who joined together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action – be it that it was not over or was only a covert act or merely an omission constituting an illegal omission. The section is, therefore, attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them

participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or prearranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inference deducible from the circumstances of each case."

13. In Suresh v. State of UP (2001)3 SCC 673, the Apex Court had occasion to consider section 34 IPC and it was held thus:-

"The dominant feature for attracting Section 34 IPC is the element of participation in absence resulting in the ultimate "criminal act". For appreciating the ambit and scope of S.34, the preceding Sections 32 and 33 have always to be kept in mind. Under S.32 acts include illegal omissions. Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The "act" referred to in the later part of S.34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of S.34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under

> S.34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention."

14. It is next contended by learned counsel that since the injuries were inflicted on the non vital parts of the body, no case under section 302 IPC is exfacie made out. We find no substance in this contention. Dr. R.K.Khatri (Pw.3) who along with other members of medical board performed autopsy on the dead body deposed that the deceased had sustained multiple fractures as per post mortem report (Ex.P-1) thus:-

> (1) Multiple fractures of Rt. femur at lower end with collection of clotted blood with surrounding tissue.
> (2) Multiple fractures of left femur at lower end & bony part is coming out from the popliteal wound.
> (3) Multiple fractures of Rt. tibia fibular bone at lower 1/3rd of leg.
> (4) Fracture of Rt. ulna bone in middle 1/3rd part with hematoma with superficial contusion on medial aspect of (4cm x 2cm) on Rt. forearm.
> (5) Dislocation of left elbow joint with hematoma.

15. Viewed against the background of previous animosity between accused Basanta with the deceased, formidable weapons used by the accused in beating, the helpless state of unarmed victim, the intensity of the violence caused and the callous conduct of the accused in persisting the assault irresistibly lead to the conclusion that the injuries caused by the accused to deceased were intentionally inflicted. We thus find appellants Basanta and Ram Swaroop guilty under section 302 read with 34 IPC.

16. In State of Andhra Pradesh Vs. Rayavarapu Punnayya (AIR

1977 SC 45) where the blows inflicted with stick caused fractures on non vital parts of body i.e. ulna, femur, tibia, fibula and patella by the accused, the Hon'ble Supreme Court convicted and sentenced the accused under section 302 IPC. It was indicated that the `intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. In Clause (3) of Section 300, instead of the words `likely to cause death' occurring in the corresponding clause (b) of Section 299, the words “sufficient in the ordinary course of nature” have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked; may result in miscarriage of justice. The difference between clause (b) of Sec.299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word “likely” in clause (b) of Section 299 conveys the sense of `probable' as distinguished from a mere possibility. The words `bodily injury ... sufficient in the ordinary course of nature to cause death” mean that death will be the “most probable” result of the injury, having regard to the ordinary course of nature. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. Cl.(4) of Section 300

would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid. The expression “bodily injury” in clause 3rdly includes also its plural, so that the clause would cover a case where all the injuries intentionally caused by the accused are cumulatively sufficient to cause the death in the ordinary course of nature, even if none of those injuries individually measures upto such sufficiency, The `sufficiency' spoken of in this clause, is the high probability of death in the ordinary course of nature, and if such sufficiency exists and death is caused and the injury causing it is intentional, the case would fall under clause 3rdly of Section 300.

17. Scope of clause 3rdly to Section 300 IPC was explained in Virsa Singh v. State of Punjab (AIR 1958 SC 465) thus:-

> “The prosecution must prove the following facts before it can bring a case under section 300 3rdly. First, it must establish quite objectively that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigation. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or some other kind of injury was intended. Once these three elements are proved to be present the enquiry proceeds further, and, fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely

objective and inferential and has nothing to do with the intention of the offender."

18. In Anda Vs. State of Rajasthan (AIR 1966 SC 148) Hon'ble Apex Court indicated that the third clause of S.300 IPC views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Here the emphasis is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The intentional injury which must be sufficient to cause death in the ordinary course of nature is the determinant factor.

19. State of Andhra Pradesh Vs. Rayavarapu Punnayya (supra) was considered in State of AP Vs. Naragudem Papireddy (2004)9 SCC 14 and it was observed by the Apex Court thus:-

(Para 16)

"Learned counsel then relied upon a judgment of this court in State of AP Vs. Rayavarapu Punnayya to substantiate his argument that even attack by lathies causing fracture which leads to death, could be construed as an act of murder punishable under section 302 IPC. We have no doubt that there may be cases like in the case of Rayavarapu where from material on record the intention of the parties would be clear that they intended to cause the death or had the knowledge that their acts would cause death of the victim. In the said case it is to be noted that the assailants went on pounding on the legs of the victim who was quite old which indicated the intention of

> the assailants, whereas in the instant case as noted above, we do not find any such material on record to come to a similar conclusion."

20. That takes us to the revision petition No.702/2006 preferred by the complainant. Having considered the material on record we are of the view that evidence against Umrao and Chhitar is not consistent and they have been rightly acquitted. We find no merit in the revision petition.

21. For these reasons, we dispose of instant matters in the following terms:-

(i) Appeal bearing No.154/2004 filed by Ram Swaroop and Basanta being devoid of merit stands dismissed. We instead of section 302/149 convict each of them under section 302/34 IPC and sentence them to suffer imprisonment for life and fine of Rs.2000/-, in default to further suffer six months simple imprisonment. We however acquit them of the charge under section 148 IPC.

(ii) We allow the appeals bearing Nos.85/2004 and 154/2004 of appellants Kailash and Jhabar Mal and acquit them of the charges under sections 148 and 302/149 IPC. Appellants Kailash and Jhabar Mal, who are in jail, shall be set at liberty forthwith, if they are not required to be detained in any other case.

(iii) We allow the appeal bearing No.553/2006 of appellants Sultan and Sua Lal. While setting aside the impugned judgment dated May 20, 2006 of learned trial Court, we acquit them of the charges under sections 148 and 302/149 IPC. Appellant Sua Lal is on bail, he need not surrender and his bail bonds stand discharged. Appellant Sultan,

who is in jail, shall be set at liberty forthwith, if he is not required to be detained in any other case.

(iv) We find no merit in the revision petition No.702/2006 preferred by complainant and the same accordingly stands dismissed.

(v) The judgment dated December 12, 2003 of learned trial court stands modified as indicated above.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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